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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PATRICIA ACOSTA, et al., 8555 West Russell Road, Unit 2015 Las Vegas, NV 89113-1812, Plaintiffs, v. INTELSAT GLOBAL SERVICE CORP. et al., Defendants.	)	CIVIL ACTION NO.: 1:04CV01618 Judge James Robertson

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs, by their counsel, respectfully submits this memorandum of points and authorities in opposition to Defendant's motion to dismiss the Complaint in this action for failure to state a claim pursuant to Rule 12(b)(6) and Rule 9(b) of the Federal Rules of Civil Procedure.

INTRODUCTION

Defendant Intelsat is an international corporation which draws its employees from all over the world. Because many of its employees are not United States citizens, and thus are not eligible for Social Security and Medicare, Intelsat provided health insurance for its retirees and their surviving spouses and dependants. Intelsat was an international treaty organization, up until 2001, when it became privatized as a private corporation. Having become privatized, and recently having been sold, Defendant Intelsat has unfortunately decided to follow the lead of Enron, by engaging in yet another example of corporate greed and dishonesty.

Defendant Intelsat claims it can disregard the explicit written promises of its predecessor corporation to provide "vested" health insurance for the retirees and surviving

spouses and dependents. Despite the fact Defendant Intelsat holds itself out as the successor corporation, and despite the fact Intelsat after privatization renewed the same promises in writing to Intelsat's retirees and their families, Defendant Intelsat claims it can ignore its promises to its retirees, many of whom took earlier retirement relying on the promise of "vested" health insurance. This is not, moreover, a case of trying to enforce an oral promise or ambiguous written commitment. Rather, Intelsat promised in writing "vested" health benefits for retirees in a formal Board resolution, which incorporated by reference a Summary Plan Description ("SPD").

Indeed, compounding its fraudulent acts, Defendant Intelsat attempts to perpetuate its fraud on this Court by withholding key evidence from this Court, and misrepresenting documents to this Court. Defendants cite parts of the Transfer Agreement, claiming it absolves them of liability. Defendants fail to disclose the very applicable provisions (quoted at length on page 6 below) in that Agreement which explicitly transferred the liability for the retirees health benefits to the Defendants!! One is hard pressed to imagine what Defendants were thinking when they decided to try to so deceive this Court.

In a sense Defendants' motion to dismiss is easily disposed of – the allegations of the Complaint must be taken as true, and moreover, Defendants' attempts to draw facts from outside the Complaint are patently improper. The Complaint puts the Defendants on notice of Plaintiffs' claims, and those claims turn on factual issues which can not be resolved by a motion to dismiss. However, the Court should not forget the fact the Defendants attempted to mislead this Court by withholding from the Court key provisions from the very document Defendants rely upon. This demonstrates that broad and very public discovery is required for this case, so all the facts can be revealed for the world to see.

STATEMENT OF FACTS

Plaintiffs have sued, alleging that Defendant corporations Intelsat, Ltd and Intelsat Global Service Corporation (hereinafter collectively referred to as "Defendant Intelsat") are the successor to International Telecommunications Satellite Organization (hereinafter referred to as "Pre-Privatization Intelsat"), and are "liable for all its debts and liabilities as a matter of contract, corporate law, and under estoppel principles" (Complaint ¶ 22).

The Complaint describes how at various times Plaintiffs were promised retiree health insurance, including to induce early retirement (Complaint at ¶ 38, 30 and 31), and some of the Plaintiffs took early retirement relying on that promise. The Complaint describes how in March, 2001, Pre-Privatization Intelsat passed a Board Resolution promising retirees "vested" ERISA covered health insurance, and binding its successors to that promise. Indeed, the Resolution provides that it must be incorporated into the transfer documents that created Defendant Intelsat, and that the Resolution prevails over any inconsistency in the transfer documents:

> Upon their actual retirement, Eligible Retirees and Eligible Dependents will be entitled to participate in the same Protected Benefits on the same terms as the Protected Retirees and Protected Dependents, and those benefits are hereby vested in the Eligible Retirees and Eligible Dependents. Neither INTELSAT, ISC nor any successor shall have the right to terminate or reduce in any material respect the Protected Benefits for any retiree or dependent covered by this Resolution, and those benefits are hereby vested in the Protected Retirees and Eligible Retirees and Protected Dependents and Eligible Dependents. ISC shall be the plan sponsor, and Intelsat Ltd shall be the guarantor, guaranteeing to pay the benefits. ISC agrees that, upon privatization, it will be bound by the provisions of the Employee Retirement Income Security Act ("ERISA").
>
> 2. INTELSAT and/or ISC can correct the draft plan so as to correctly reflect the current (as of January 1, 2001) benefits, administration, and plan features. The final plan document shall be that issued to employees and retirees on or before privatization, which shall reflect the benefits, administration and plan features as of January 1, 2001.

* * *

> 5. This Resolution shall be incorporated into the asset transfer documents that will effect the INTELSAT privatization as a condition of the transfer. The benefits and rights provided herein shall be a vested ERISA covered plan established and maintained by ISC, and its successors, and guaranteed by Intelsat Ltd and its successors. The commitments made in this Resolution shall remain a continuing obligation of ISC, Intelsat Ltd, and their successors until the death of the last surviving retiree or dependent covered by this Resolution. To the extent that any provision in this Resolution conflicts with a provision of the asset transfer documents, the terms of this Resolution shall control with respect to the rights and obligations of INTELSAT, Intelsat Ltd, ISC and their successors, and the retirees and dependents covered by this Resolution.

Complaint ¶ 39 and Exhibit C To Defendant's Memorandum (emphasis added).

There is no question but that Pre-privatization Intelsat promised vested health insurance to Plaintiffs and the class they seek to represent. Indeed, Pre-privatization Intelsat promised that Defendant Intelsat would honor that promise (Complaint at ¶ 35 and 36). Moreover, the Board resolution is clear the Resolution was to be incorporated into the transfer documents and the Resolution prevails over any inconsistency in the transfer documents (Exhibit C to Defendant's Memorandum).

The Complaint also notes that Defendant Intelsat, after privatization (October, 2001), renewed the promise of vested health benefits to the retirees:

> "The Board resolution applies to all Intelsat retirees who are participating in Intelsat's health plan as of the privatization date (18 July 2001) . . . the current level of Intelsat retiree health benefits is legally vested in the group identified in paragraphs (a) and (b) above, is guaranteed by the privatized Intelsat and its successors and cannot be reduced or taken away by the privatized Intelsat . . . Intelsat's obligation to retirees under the resolutions is enforceable by retirees under the U.S. laws (ERISA) which protect vested retirement benefits."

Complaint ¶ 39 (emphasis added).

The Complaint in Count I claims vested benefits under ERISA, as well as a breach of fiduciary duty (Complaint ¶ 52 through 54) and requests a declaratory judgment (Complaint ¶ 50). Count II alleges a breach of contract. Pre-privatization Intelsat made a contract (the Board Resolution), and Defendant Intelsat assumed that contract under the Resolution itself and the transfer documents, as well as making its own independent post-privatization promise (Complaint at ¶ 55-59). Count III is an estoppel claim based on both pre-privatization and post-privatization written promises. (Complaint at ¶ 60-63). Count IV is for fraud, again based on both pre-privatization and post-privatization written promises. (Complaint at ¶ 64-65).

Defendants cite to and rely on a Restructioning Agreement and Transfer Agreement, and claim the ability to do so because they allege that the Plaintiffs cited to them in the Complaint (Defendants' Mem. 13-14). The problem is, Plaintiffs' Complaint cites to neither document, so Defendants' premise is simply wrong, and its actions in relying on the documents, are patently improper. Defendants also cite to retirees' retirement dates (Defendants' Mem. at 8 n6), in support of their motion, and do not even pretend to have a proper basis for doing so, since such dates are not in the Complaint. All the Defendants have done by their improper citation of evidence is nicely demonstrate there are factual issues which can not be resolved based on the Complaint alone, and thus their motion to dismiss must be denied.

Of great concern, the Defendants not only failed to produce the complete documents they cite to and rely exclusively on for their argument, they intentionally and deceptively omitted from their memorandum and the attached exhibit the applicable key provisions of the Transfer Agreement. The Transfer Agreement clearly transferred liability for the retiree benefits to Defendant Intelsat, yet Defendants failed to produce this provision in the copy of the Transfer Agreement they provided to the Court:

ARTICLE II

AGREEMENT TO TRANSFER

Section 2.03. Assumed Liabilities. On the terms and subject to the conditions provided herein, at the Closing, Intelsat (or to the extent provided in Article V. Intelsat U.K., LLC or Service, as the case may be) agrees to assume and discharge or perform when due, all Liabilities of the IGO except for the Excluded Liabilities (the "Assumed Liabilities"), including without limitation, the following:

* * *

(f) Liabilities for accrued employer retirement and other benefits reflected or reserved against in the Closing Balance Sheet, for employee benefits (including, but not limited to, vacation days, sick days and similar benefits), compensation and severance liabilities associated with all Employees and for all obligations and commitments of the IGO in respect of health benefits of retired employees of the IGO: and

* * *

ARTICLE IX

EMPLOYEES AND BENEFITS

* * *

Section 9.02. Benefits. As of the Closing Date Intelsat shall assume and be responsible for all liabilities relating to, all of the IGO's pension, retirement benefits, medical insurance coverage (including dental and vision), life and accident insurance, and other employee compensation and benefit plan covering the current and former employees of the IGO and their dependants which were in effect at any time prior to the Closing Date. Without limiting the preceding sentence each of the IGO, Intelsat and Service agrees that it shall take all action necessary in order for Service to become the plan sponsor and plan administrator under each of the INTELSAT Staff Retirement Plan and the INTELSAT Supplemental Retirement Income Plan (the "Plans"), effective as of the Closing Date, including (but not limited to) preparing and executing amendments to such Plans and the trust agreements thereunder and obtaining the approval of such amendments from U.S. Internal Revenue Service.

Transfer Agreement (emphasis added).[1] It is inexcusable that Defendants tried to hide these two critical provisions from the Court. It is equally clear that by these two provisions, Defendant Intelsat accepted liability to provide the retirees and their surviving spouses and dependants vested ERISA health benefits.

The Complaint must be taken as true, and as such, it clearly states valid causes of action. Moreover, as the above statement of facts reveal, there are obviously factual issues which the parties dispute, not the least of which is the meaning of the above noted language in the Transfer Agreement. But there is much more - how does the Board Resolution interact with the Transfer Agreement? What is the plan document? The Plaintiffs believe the Board Resolution, which incorporated by reference a SPD, is the plan document, for which the Defendants accepted liability in the Transfer Agreement. Indeed, Defendants provided ERISA health benefits starting on July 18, 2001, yet the SPD Defendants rely upon was not produced until October, 2001 (it was improperly and deceptively back dated to June 25, 2001). Thus, the only plan document from July 18, 2001 to October, 2001 was the Board Resolution, and the SPD which it incorporated by reference. At a minimum, discovery is needed to flush out these factual issues.

[1] These are the provisions which were sent to the retirees' association when they asked for assurances the Resolutions giving vested health benefit rights would be followed by Privatized Intelsat. Plaintiffs assume they are in the final Agreement.

It is shocking that Defendants did not advise the Court of these provisions. While in footnote 7 of their memorandum, Defendants' claim confidentiality, the above noted provisions are in the very same documents Defendants freely disclosed to the Court in Exhibit B of Defendants' memorandum. It is obvious confidentiality is not the issue (since Defendants disclosure the provision they believe assist them), but rather Defendants have intentionally mislead the Court and are involved in a blatant cover up. The Defendants are clearly playing fast and loose with not only the Plaintiffs, but the Court, and such conduct should not be tolerated. Plaintiffs will move for sanctions once full discovery is taken.

ARGUMENT

I. Standard of Review

A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P 12(b)(6) should only be granted if it appears beyond doubt that the plaintiffs can prove no state of facts in support of their claim that would entitle them to relief. Barr v. Clinton, 361 U.S. App. D.C. 472, 370 F.3d 1196, 1201 (D.C. Cir. 2004), Schuchart v. La Taberna del Alabardero, Inc., 361 U.S. App. D.C. 121, 365 F.3d 33 (D.C. Cir. 2004). Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). In evaluating a motion to dismiss, the court must liberally construe the complaint, drawing all reasonable inferences and weighing all facts in favor of the plaintiffs. Pitney Bowes, Inc. v. U.S. Postal Service, 27 F. Supp. 2d 15, 19 (D.D.C. 1998), citing Hishon v. King and Spaulding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984); Swierkiewicz v. Sorema, 534 U.S. 506, 513-514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). A motion to dismiss may be granted only if there is no legal theory under which Plaintiff can recover, and should be granted sparingly. Agora, Inc. v. Axxess, Inc., 90 F. Supp. 2d 697 (D. Md. 2000), aff'd, 248 F.3d 1133 (4th Cir. 2001).

II. Defendant Corporations Are The Successor Corporation

The Complaint alleges Defendant corporations[2] are the successor corporation to International Telecommunications Satellite Organization (hereinafter referred to as "Pre-

[2] Defendants claim Intelsat Service is the Plan Administrator, and should be named as a Defendant in place of Kathleen Alexander, who denied Plaintiff Williams' administrative claim (Defendants' Mem. at 3n.2). Plaintiffs are willing to stipulate to a substitution of parties, but it is unclear who the plan administrator is. The Defendants and the Plan document claim it is Intelsat Services Corporation, but the claim denial letter stated it is Intelsat Global Service Corporation.

Defendant Intelsat Ltd. is another story. In Plaintiffs view, Intelsat Ltd. is the successor corporation, and liable for all the plan benefits. The Board Resolution also states Intelsat Ltd. is the guarantor of the benefits. As such, Intelsat Ltd. must remain as a Defendant. Moreover, it is liable for the fraudulent statements as the successor corporation.

privatization Intelsat"), and that allegation (Complaint at ¶ 22) must be taken as true for purposes of this motion. Moreover, 47 U.S.C. § 769 provides that privatized Intelsat is the successor corporation. Indeed, the Defendants concede that Intelsat Ltd., or at least Defendant Intelsat Global Service Corporate, is the successor corporation (Defendants' Mem. at 22n.10).

Moreover, as noted above Defendant corporations themselves also independently promised to accept the liabilities of Pre-privatization Intelsat.

III. Defendant Corporations Are Liable For The Promises Of Pre-Privatization Intelsat Because They Are The Successor Corporation, The Transfer Documents Explicitly Say They Assumed The Liability, And Defendant Intelsat After Privatization Has Represented To The Retirees That Defendant Intelsat Will Pay The Vested Health Benefits

Defendants admit they are the successor corporation, and as such, Plaintiffs believe Defendants are unquestionably liable for Pre-Privatization Intelsat's promises to the retirees and their families. Defendants argue, however, that Pre-privatization Intelsat could not be sued on its promises, and thus Defendants also can not be sued on those promises. There are four easy responses to this argument. First, Pre-privatization Intelsat only had immunity from process and lawsuits, and immunity from suit, does not mean a liability does not exist. Rather, it only means the promise can not be enforced by a lawsuit; it does not mean the promise was not made. Defendants, however, agreed to assumed that liability, while at the same time, Defendants do not enjoy the same immunity of Pre-privatization Intelsat, as is made clear by the very statute which allowed the creation of Defendants. The statute which created Defendant Intelsat explicitly provides that Defendant Intelsat does not enjoy the immunities of Pre-privatization Intelsat, 47 U.S.C. § 763(3). Second, the immunity statute provides the immunity can be waived, and Pre-privatization Intelsat clearly waived its immunity by the Board Resolution and the transfer documents wherein Pre-privatization Intelsat committed Defendant Intelsat to provide ERISA vested health benefits. Third, Defendants made their own independent promises to provide

vested health insurance to retirees in the Transfer Agreement, as well as subsequent documents. Thus, even if the promises of Pre-privatization Intelsat were unenforceable, Defendant Intelsat could, and in the Transfer Agreement and its October, 2001 memorandum did, commit to fulfill those promises. Indeed, they made the promise by signing the Transfer Agreement, as well as in other post-privatization documents. Finally, as a matter of corporate and ERISA law, the obligations of Pre-privatization Intelsat became the obligations of the successor corporations.

Defendants assume immunity from suit, means that one can not have liabilities. The fact that one can not be sued in court for a debt or liability, does not mean there is not a debt or liability. Pre-privatization Intelsat could not be served with process or sued in a United States Court, 22 U.S.C. § 288. That does not mean it could not have liabilities. Indeed, the immunity statute provides that Pre-privatization Intelsat could waive its immunity, and thus agree to be sued for its liabilities (Id.). The parties themselves also recognized in the Transfer Agreement that there were liabilities of Pre-privatization Intelsat, since Defendant Intelsat in the Transfer Agreement explicitly agreed to assume the liabilities of Pre-privatization Intelsat, explicitly including the obligation to provide health benefits to the retirees. See Statement Of Facts.

Even if the immunity from a lawsuit was the same as having no liability, Defendants argument fails for two reasons. First, as noted above, the very statute that authorized the transformation of Pre-privatization Intelsat into Defendant Intelsat , 47 U.S.C. § 763(3), expressly provides that the immunity of Pre-privatization Intelsat "shall not be extended to any successor entity . . ." (Id). Thus, the very statute which created Defendant Intelsat, explicitly provides that the immunities which Pre-privatization Intelsat enjoyed, do NOT apply to and do not protect Defendant Intelsat, 47 U.S.C. § 763(3). Second, the immunity statute, 22 U.S.C. § 288a, provides the entity can "expressly waive their immunity for the purposes of any

proceedings or by the terms of any contract." The Board Resolution, as well as the Transfer Agreements, are clearly an expressed waiver of immunity. Pre-privatization Intelsat clearly waived its immunity in the Board Resolution, by stating that its successor must comply with its promise, and that the Resolution prevails over the Transfer Agreement. As the successor to Pre-privatization Intelsat, Defendant Intelsat is bound by Pre-privatization Intelsat's Board Resolution that promises retirees vested health benefits, and states that the Resolution supercedes any inconsistent provision in the Transfer Agreement. Moreover, the Transfer Agreement itself also says that Defendant Intelsat is liable for the benefits, knowing Defendant Intelsat has no immunity protection.

Defendants cite to Kubiszyn v. Terex Division of Terex Corp., 212 A.D. 2d 93, 628 N.Y.S. 2d 994 (1995). But that case merely holds if an employer has a workers' compensation exclusivity bar, a substantive defense, the successor corporation gets the same defense. This is not a case of an immunity to suit, but a substantive defense. Pre-privatization Intelsat had no substantial defenses to its promises to the retirees. Rather, Pre-privatization Intelsat was simply immune from process and lawsuits. Moreover, as noted above, Pre-privatization Intelsat waived its immunity, and the statute which allowed the creation of Defendant Intelsat, explicitly states Pre-privatization Intelsat's immunity does not apply to its successors.

Even if Defendant Intelsat enjoyed the immunities of Pre-privatization Intelsat for pre-privatization Intelsat's promises, Defendant Intelsat made its own promises, and as noted above, there can be no doubt that there are no immunities to protect Defendant Intelsat from enforcement of its own promises. Defendant Intelsat signed the Transfer Agreement in which it promised to pay the retirees' health benefits. Moreover, 3 months after privatization, Defendant Intelsat in writing, again promised the vest health benefits to the retirees and their families

(Complaint at ¶ 39). These renewed promises of post-privatization Defendant Intelsat are clearly enforceable.

Finally, as a matter of corporate and ERISA law, a successor corporation can be liable for plan benefits of a predecessor corporation, and under the facts of this case, should be so obligated. Intelsat Ltd. is the successor to Pre-privatized Intelsat, and liability under ERISA and corporate law can be imposed upon a successor employer. Gardner v. Rainbow Lodge, Inc., 1990 U.S. Dist. LEXIS 20872 [*4] (SD TX 1990); Herman v. Jackson County Hospital, 1998 U.S. LEXIS 20759 (MD TN 1998). As the Court of Appeals For the Seventh Circuit noted:

> The imposition of successor liability is appropriate in those cases where vindication of an important federal statutory policy has necessitated the creation of an exception to the common law rule, where the successor has notice of the liability in question and where there has existed sufficient evidence of continuity of operations between the predecessor and successor.

Upholsterers International Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323, 1327 (7th Cir. 1990). Indeed, under the doctrine of alter ego, the Courts have held a parent corporation liable for underfunded pension liability it transferred to a subsidiary corporation. Lumpkin v. Envirodyne Industries, 933 F.2d 449 (7th Cir. 1991). In Lumpkin v. Envirodyne Industries, 933 F.2d 449, 460 (7th Cir. 1991), quoting Taylor v. Standard Gas & Electric Co., 306 U.S. 307, 322, 59 S. Ct. 543, 550 (1992), the Court of Appeals noted it will not recognize a separate corporate entity "when to do so would work fraud or injustice." The Court went on to note that the "underlying congressional policy behind ERISA clearly favors the disregard of the corporate entity in cases where employees are denied their pension benefits." Id. at 461. The court went on to note that in Alman v. Danin, 801 F.2d 1 (1st Cir. 1986), the "court recognized that the corporate veil may be pieced more easily in ERISA cases than in pure contract cases in order to promote the federal policies underlying the statute." Id. at 461, citing 801 F.2d at 4. Of

some interest, the court held a parent corporation could be held liable for ERISA claims even though the subsidiaries were released. Id. at 462. The court also noted the "test for piecing the corporate veil invariably involves factual questions…." Id. at 463.

Likewise, in Maryland Electrical Industry Health Fund v. Kodiak Utility Construction Inc., 289 F. Supp. 2d 698 (D. Md 2003), the alter ego doctrine was applied in an ERISA case to hold a successor company liable for the ERISA benefit liabilities of its predecessor company. In Maryland Electrical Industry Health Fund v. Kodiak Utility Construction Inc., 289 F. Supp. 2d 698 (D. Md 2003), the court, citing Mass. Carpenter Cent. Collection Agent v. Belmont Concrete Corp., 139 F.3d 304, 308 (1st Cir. 1998), held that the "Alter Ego analysis applies to traditional labor dispute and to claims involving employee benefit funds under ERISA." The court noted that in "assessing alter ego status, courts have considered a variety of factors, including continuity of ownership, similarity of the two companies in relation to management, business purpose, operation, equipment, customers, supervision…." Id. at n.3.

The facts of Intelsat's actions here are analogous to the corporate deception found actionable in Varity Corp. v. Howe, 516 U.S. 489, 116 S. Ct. 1065, 134 L.Ed.2d 130 (1996). In Varity an employer mislead employees into believing that benefit liabilities were being transferred into an adequately funded subsidiary. Defendant Intelsat mislead Plaintiffs into believing vested health benefit rights have been transferred to Defendant Intelsat. Indeed, the courts have often recognized successor liability under ERISA law. Bish v. Aquarion Services Co., 289 F. Supp. 2d 134 (D. Conn. 2003).

In Bish, the Court noted a successor can assume liability either expressly, or by an "implied assumption of the agreement," by its acts and words. Post-privatization, Defendant Intelsat has stated the retirees have vested benefits (e.g. Complaint at ¶ 39), and in numerous

filings with the SEC, Intelsat has represented it is the "successor" to the International Telecommunications Satellite Organization.

IV. Count I Is A Valid ERISA Claim, And The Board Resolution Is The Plan Document

Defendants attempt a boot strapping argument by claiming Exhibit D (attached to their memorandum) is the only plan document, and that no other documents can be the plan because they fail to meet the requirements for a plan. To begin with, if that were true, the Defendants violated ERISA by not having a plan document from July 18, 2001 to October, 2001 when they issued their SPD (albeit backdated to Jun 25, 2001). Moreover, if Defendants' argument were correct, then an ERISA plan could avoid all liability by not having the required appeal procedure in the plan document. Accepting Defendants' argument, there could be no plan, and thus no liability, because the plan document is defective. The Defendants cite to no caselaw to support their proposition that liability is avoided if a plan document is defective, and in fact, there is none. Rather, the Courts will impose liability on a plan even if its plan document is defective:

> The failure of Park West to circulate the necessary paperwork to memorialize the adoption of a plan it had created was an act of mismanagement, not a decision with regard to plan formation or amendment. The line of cases recognizing the freedom of persons or corporations to adopt or modify pension benefit plans in various forms thus fails to assist the defendant here. Park West's violation of fiduciary duty is therefore actionable under ERISA.

Gallagher v. Park West Bank and Trust, 11 F. Supp. 2d 136, 141 (D. Mass. 1998). See also Warren v. Cochrane, 235 F. Supp. 2d 1 (D. Me. 2002) (ignoring an invalid amendment).

Indeed, the Courts have recognized an "informal benefit plan" where the plan sponsor made promises, but then issued inadequate plan documents. Henglein v. Informal Plan For Plant Shutdown Benefits For Salaried Employees, 974 F.2d 391 (3rd Cir. 1992). Likewise, employers can in documents outside the ERISA plan, make the plan benefits vested. International Union v.

Yard-Man, 716 F.2d 1476, 1479 (6th Cir. 1983), cert. denied, 465 U.S. 1007, 104 S. Ct. 1002, 79 L. Ed2d 234 (1984); Golden v. Kelsey – Hayes Co., 73 F.3d 648, 656 (6th 1996). Vested ERISA rights have been found based on promises made in successor corporation transfer agreements, just like the one in this case. Kinek v. Gulf & Western, Inc., 720 F. Supp. 275 (S.D.N.Y. 1989), aff'd, 22 F.3d 503 (2nd Cir. 1994).

At this stage, the court must accept the Plaintiffs' claim that the Board resolution, which incorporated by reference a draft SPD, is the plan document. As such, Count I can not be resolved on a motion to dismiss.

Defendants rely on the cases of Sprague v. General Motors Corp., 133 F.3d 388, 400 (6th Cir. 1998); Wise v. El Paso Natural Gas Co., 986 F.2d 929, 934 (5th Cir. 1993); In re Unisys Corp. Retiree Med. Benefit ERISA Litig., 58 F3d 896, 903 (3d Cir. 1995); Gable v. Sweetheart Cup Co., Inc., 35 F.3d 851, 856 (4th Cir. 1994). However, in none of those cases did the employer promise "vested" health benefits. Indeed, those courts held that what was missing from those plaintiffs' claims therein was a promise of vested benefits. Herein, Plaintiff rely on explicitly written promises of "vested" health benefits for retirees and their family.

Defendants strangely argue that they did not promise "vested" benefits (Defendants' Mem. at 20), but the Board Resolution and October, 2001 statement by Defendants promised "vested ERISA covered plan" (Complaint at ¶ 35) and "legally vested" benefits (Complaint at ¶ 39). It is hard to imagine how words could be clearer.

Plaintiffs' position is that the Board Resolution is a plan document. It clearly outlined the benefits to be provided and included even a funding mechanism, and it incorporated by reference a draft SPD. Likewise, the Defendants' memorandum in October, 2001, renewing the promise of vested benefits, is a plan document. Indeed, even the Transfer Agreement in relevant part is a

plan document – benefits are promised. Moreover, the Plaintiffs need not worry about the Defendants' argument that the Transfer Agreement does not allow third party beneficiaries. To begin with, the Plaintiffs are suing under the Board Resolution, which has no such limitation, and provides that the Resolution prevails over any inconsistency in the Transfer Agreement. Also, the Transfer Agreement is ambiguous, since it clearly is intended to benefit third parties, and the explicit promises prevail over any boilerplate clause. At a minimum, extrinsic evidence would be needed to resolve the conflict. Most importantly, however, since the Defendants assumed the liability for the retiree benefits, the federal ERISA statute provides its own enforcement mechanism for the Plaintiff retirees, 29 U.S.C. § 1132, and thus no contracted enforcement provision is needed. The Plaintiffs do not need a contractual provision to enforce their promised ERISA rights, the ERISA statute provides its own enforcement rights to all plan beneficiaries.

Thus, the motion to dismiss must be denied.

V. Plaintiffs Have Properly Plead A Claim For Breach Of Fiduciary Duty

Defendants argue that they did not violate any fiduciary duty under ERISA because creating and adopting an ERISA plan is not a fiduciary act. (Defendants' Mem. at 24). But it is not the creation of the plan that Plaintiffs allege constitutes the breach. Rather, Defendant acted in a fiduciary capacity when making representations about the benefit plan, and in not creating the plan document they have committed to. When Defendant Intelsat exercised its alleged discretionary authority in denying benefits to surviving spouses, and claiming it was not bound by the Board Resolution, its fiduciary duty was violated. See, Varity Corp. v. Howe, 516 U.S. 489, 502-04, 116 S. Ct. 1065, 134 L. Ed2d 130 (1996). The courts have recognized that if a plan is written improperly to exclude retirees, the provision of the plan excluding the retirees is invalid. Warren v. Cochrane, 235 F. Supp. 2d 1 (D. Me. 2002). Likewise, the failure of a plan

sponsor to prepare the paperwork to implement a plan provision is actionable as a breach of fiduciary duty, it is not a protected plan creation activity. Gallagher v. Park West Bank and Trust, 11 F. Supp. 2d 136 (D. Mass. 1998).

To promise benefits, and represent that benefits are being provided, when in fact the benefits are not provided for, is a breach of fiduciary duty. The employer can and will be held liable for breach of fiduciary duty for such misconduct. The fact the plan does not provide the promised benefit is no defense – it is the lie which is actionable. Curcio v. John Hancock Mutual Life Insurance Co., 33 F.3d 226, 238-239 (3rd Cir. 1994); Delvin v. Empire Blue Cross and Blue Shield, 274 F.3d 76 (2nd Cir. 2001).

VI. Plaintiffs' Breach of Contract Claim Is Proper

Plaintiffs have properly plead breach of contract actions based on pre-privatization and post-privatization promises which were accepted by the retirees. Pre-privatization Intelsat, to which ERISA does not apply, made clear written promises of vested health benefits to the retirees. Defendant Intelsat, in the transfer agreement, accepted liability for those promises. Thus, Defendants' can be sued under those contractual promises.

Defendants claim the Transfer Agreement excludes third party beneficiaries. However, other provisions of the Transfer Agreement are inconsistent with that argument. Moreover, the Board Resolution states it must be incorporated into the transfer documents, and it supercedes any inconsistent provision in the Transfer Agreement. Indeed, Defendant Intelsat, after privatization, made its own promises in its October, 2001 memorandum (Complaint at ¶ 39), and moreover, that post-privatization memorandum shows the meaning of the other documents, and the parties' intent that Defendant Intelsat would be liable for the retirees vested health benefits.

The case Defendants cite to support their argument, specifically looked at the entire agreement to determine if the benefit to the third party was within the four corners of the

contract. Onanuga v. Pfizer, 2003 WL 22670842 at *5. (S.D.N.Y.) This court has yet to see the complete documents, and thus the motion to dismiss can not be granted.

In order to address these elements, Plaintiffs must be given an opportunity to do discovery and review the entire agreements. Defendants should not be able to limit the Plaintiffs' claim through their selective production to the Court. Indeed, extrinsic evidence may be required to explain the inconsistencies in the agreement, and with the Board resolution. Accordingly, the motion to dismiss should be denied.

VII. The Plaintiffs Have Properly Plead Promissory Estoppel

This Court has recognized promissory estoppel under ERISA federal common law Psychiatric Inst. Of Washington, D.C. v. CIGNA, 780 F. Supp. 24, 32 (D.D.C. 1992). The Complaint properly pled the elements for promissory estoppel (Complaint at ¶ 30, 32, 34, 35, 36, 37, 39, 60-63). False promises were made (if Defendants' arguments are accepted) and Plaintiffs relied upon them. They are actionable under the doctrine of promissory estoppel. Curcio v. John Hancock Mutual Life Insurance Co., 33 F.3d 226, 238 (3rd Cir. 1994); Delvin v. Empire Blue Cross and Blue Shield, 274 F.3d 76 (2nd Cir. 2001).

Defendants falsely assume retirees who were already retired could not rely on the October, 2001 promise. However, many of the retirees are not citizens of the United States and thus have neither Social Security or Medicare coverage. If Plaintiffs knew Defendants were not persons who honor their promises, Plaintiffs could have tried to purchase health insurance, or pressured Congress to force coverage in the privatization process.

In any case, this question of reliance involves factual issues which can not be resolved by a motion to dismiss. To the contrary, Plaintiff's allegations must be accepted as true, and that resolves the motion to dismiss in terms of promissory estoppel.

VIII. Plaintiffs' Fraud Count Is Proper And Gives Ample Notice Of The Alleged Fraudulent Statements, Including Quoting Them

The Plaintiffs have alleged fraudulent promises were made before Pre-privatization, and that in the Transfer Agreement, Defendant Intelsat assumed the liability for Pre-privatization Intelsat's action. In addition, Defendant Intelsat post-privatization made its own fraudulent promises.

The Complaint states when the statements were made, who made them, and what was said (Complaint at ¶ 30,32, 34-37, 39). Indeed, the Complaint quotes most of the statements which are alleged to be fraudulent. Thus, Defendants' Rule 9 defense is inapplicable.

The Defendants in their memorandum argue that the promises they and their predecessors made were never intended to be followed, and that it was never intended that the Plaintiffs would benefit from them. The Defendants essentially argue the promises in the Board Resolution and the Transfer Agreement were a sham. The Complaint anticipated such dishonorable conduct by the Defendants, and thus has properly pled all the elements for fraudulent, constructive and negligent misrepresentation:

> When Defendants made the promises and representations noted above that Plaintiffs and their spouses and dependents, including surviving spouses and dependents, had vested health benefits, Defendants did not intend to fulfill their promises and representations, they knew the promises and representations were false and they intended to deceive the Plaintiffs, the Defendants were reckless in making the promises and representations without knowing if they were true and intended to deceive the Plaintiffs, and/or the Defendants were negligent in making the promises and representations, and intended the Plaintiffs to rely on the promises and representations. A reasonable person would not make such promises and representations without knowing they were true, and a reasonable person would reasonably and justifiably rely on such promises and representations, and Plaintiffs in fact reasonably and justifiably relied upon such promises and representations to their extreme detriment and the Plaintiffs have suffered damages as a result of their reliance.

Complaint at ¶ 65. Having made their bed, the Defendants can not complain about sleeping in it.

Of course, if the Complaint is deficient, the Plaintiffs would ask leave to amend the Complaint.

CONCLUSION

Defendant's motion to dismiss should be denied.

Respectfully submitted,

PLAINTIFFS

By _____

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SEYFARTH SHAW LLP
815 Connecticut Avenue, N.W.
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DATED: October 29, 2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 2004, the foregoing Memorandum in Support of Defendants' Motion to Dismiss was electronically filed and served by first class mail on:

G. Stewart Webb, Jr.
Venable LLP
575 7th Street
Washington, DC 20004

_____
Lawrence P. Postol

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PATRICIA ACOSTA, et al., 8555 West Russell Road, Unit 2015 Las Vegas, NV 89113-1812, Plaintiffs, v. INTELSAT GLOBAL SERVICE CORP. et al., Defendants.	)	CIVIL ACTION NO.: 1:04CV01618 Judge James Robertson

ORDER

Upon consideration of the Motion to Dismiss filed by Defendants Intelsat Global Service Corporation, Intelsat, Ltd., and Kathleen Alexander, Administrator, the response, and reply thereto, it is this ___ day of _____, 200___, ORDERED:

1. That the Motion be, and hereby is, DENIED.

_____
Honorable James Robertson
Judge, United State District Court for the District of Columbia

Serve:

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Washington, DC 20006-4004
Counsel For Plaintiffs

G. Stewart Webb, Jr., Esquire
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Counsel For Defendants

IN THE UNITED STATES DISTRICT COURT
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PLAINTIFF'S MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

PLAINTIFFS ACOSTA, ET AL.

SEYFARTH SHAW LLP
815 Connecticut Avenue, N.W.
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Date: October 29, 2004